

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1211

To be argued by
RICHARD F. LAWLER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1211

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR DELEON,

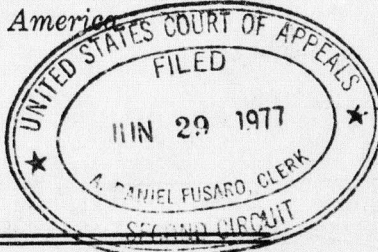
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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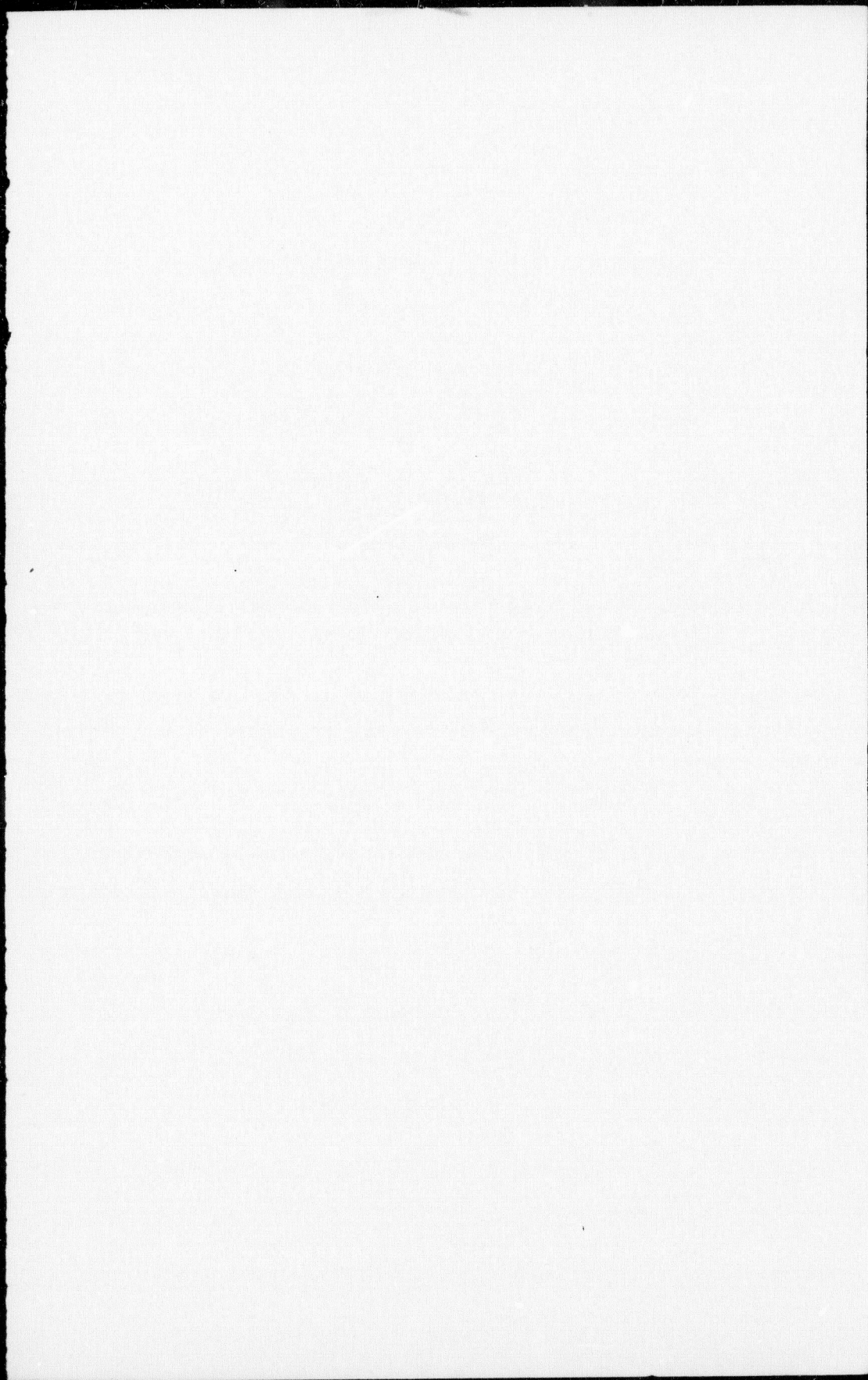


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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-211

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR DELEON,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Victor DeLeon appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on March 30, 1977, following his plea of guilty before the Honorable Lloyd F. MacMahon, United States District Judge.

Indictment 77 Cr. 28 was filed on January 13, 1977, and charged Victor DeLeon and Victor Matos * in two counts with possession of counterfeit Federal Reserve Notes and dealing in counterfeit Federal Reserve Notes, in violation, respectively, of Title 18, United States Code, Sections 472 and 473.

* The Government permitted Matos to enter a deferred prosecution program after the Indictment was filed.

DeLeon moved to suppress the counterfeit Federal Reserve Notes found on his person by the New York City police officer who arrested him. A hearing was held on March 1, 1977, at the conclusion of which DeLeon's motion was denied by the District Court in an oral opinion later supplemented by a written memorandum, filed on March 14, 1977.

Following the hearing, on March 1, 1977, DeLeon pleaded guilty to both counts of the Indictment, preserving his right to appeal the District Court's decision denying his suppression motion.*

On March 30, 1977, Judge MacMahon sentenced DeLeon as a young adult offender, suspended the imposition of sentence and placed DeLeon on probation for two years, pursuant to Title 18, United States Code, Sections 5010(a) and 4216.

Statement of Facts

In his plea of guilty, DeLeon admitted that on December 10, 1976, he purchased and had in his possession \$500.00 in counterfeit Federal Reserve Notes. DeLeon stated that he and his co-defendant were in the process of passing the counterfeit bills at about the time of their arrest when \$270 in counterfeit currency was found on

* The Government agreed to allow DeLeon to preserve his right to appeal in accordance with the procedures approved by this Court. *United States v. Fury*, Dkt. Nos. 76-1506, 76-1512, slip op. 3195, 3196 (2d Cir. April 27, 1977); *United States v. Mullens*, 536 F.2d 997 (2d Cir. 1976); *United States v. Bronstein*, 521 F.2d 459, 460 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Pond*, 523 F.2d 210, 212 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States v. Burke*, 517 F.2d 377, 379 (2d Cir. 1975).

DeLeon's person by the arresting officer. (Tr. 13-18, 20).^{*} DeLeon's suppression motion asserted that the contraband had been seized without warrant and pursuant to an arrest not supported by probable cause. In view of the factual issues raised by defendant's oral motion, Judge MacMahon conducted a suppression hearing on March 1, 1977.

A. The Suppression Hearing

At approximately 7:00 p.m. on the night of December 10, 1976, an individual came into the discount store at 101st Street and Broadway managed by George Morales and asked for a man's cologne set costing \$8.10. According to Morales, who testified at the suppression hearing, the man presented in payment a \$50 bill that Morales examined and believed to be counterfeit. (H. Tr. 37). Morales then showed the bill to his co-worker, Rosie Martinez, who also thought it was counterfeit. Morales refused to accept the bill.

The individual, described by Morales as a "Dominican" or "Hispanic" male of medium build, about 5'8"-5'9", 22-23 years old and wearing a brown coat (H. Tr. 38), then left the store, but returned a short while later with a cohort. The latter, also a "Spanish" male, 5'3"-5'4", about 18-19, wearing a black coat, told Morales that the bill was good and that he had just received it from a check cashing store. (H. Tr. 39). Mr. Morales still refused to accept the bill, whereupon both individuals left the store and entered their car: a blue Plymouth Roadrunner jacked up in the rear with a white racing stripe

^{*} "Tr." refers to the transcript of DeLeon's plea allocution on March 1, 1977. "H. Tr." refers to pages in the transcript of the suppression hearing held earlier on the same day. References to defendant's Appendix are cited as "A." "Br." refers to defendant's Brief on this appeal.

in the middle. Morales watched the two men leave the store and enter the distinctive car in which he also noticed a third person—whom he could not describe—at the driver's wheel. (H. Tr. 40-41). Justifiably concerned at what had transpired to that point, Morales instructed Martinez, his co-worker, to call the police. (H. Tr. 40).

Martinez' call was relayed to Louis Sommella, a New York City police officer for six years, who was on patrol in a taxicab with his partner, Detective Rashid Abdul-Rahim. Sommella testified that he and his partner received a call over the car radio with a description of two male "Hispanics" in their late teens or early twenties who had passed or attempted to pass counterfeit money in a store at 101st Street and Broadway, New York, New York. (H. Tr. 7). Officer Sommella and his partner responded to this call, immediately proceeding to the store where they spoke with Morales and Martinez. (H. Tr. 8).

At the store, Morales told the police officers of what had transpired just moments before, and, in particular, that the two men had given him a \$50 bill he believed to be counterfeit. Morales briefly described the two men (H. Tr. 19, 43)* and advised Sommella that the two sus-

* Sommella could not recall the exact description provided at this time by Morales. (H. Tr. 19). Morales testified that initially he gave the police a "quick" description of both individuals who came into his store, (H. Tr. 41), describing one as wearing a black cashmere coat, 5' 2"-5' 4" in height, and 18-19 years old; the other was described as wearing a brown coat, of medium build and 5' 8"-5' 9" tall. Morales did not remember if he told the officers anything about the nationality of either suspect. (H. Tr. 43). However, the police learned of the suspects' nationality from their radio communication, and it was Martinez, the store clerk, who called in the complaint to the police that resulted in Sommella's visit. Martinez did not testify at the suppression hearing.

pects had left five minutes before in a blue Plymouth Roadrunner jacked up high in the rear, with a three-foot-wide racing stripe down the back. Morales agreed to go with the police officers to look for the automobile. (H. Tr. 9).

Sommella, Abdül-Rahim, Sgt. Thomas Tennant, who had joined them at the store, and Mr. Morales then proceeded together down Broadway in the police taxi. At approximately 90th Street and Broadway Morales saw and pointed out the car that had been used by the men who attempted to pass the counterfeit bill. Officer Sommella specifically asked Mr. Morales, "is that it, the Roadrunner?" Morales told him, "yes, the blue Plymouth with the white racing stripe, that's the car." * At that point Morales, concerned for his own protection, ducked down behind the front seat where he remained until the entire episode was over. (H. Tr. 9, 30).

When the Roadrunner was first sighted and identified by Morales there were two people in the car, which was proceeding slowly (approximately 5 miles per hour) (H. Tr. 33) south down Broadway. The policemen observed a passenger get out, after which the car then continued to proceed south at the same speed. The car finally stopped between 89th and 90th Street, (H. Tr. 33), at which time the undercover taxi pulled up alongside the Roadrunner. Officer Sommella got out of the police taxi and approached the Roadrunner. Seated at the driver's wheel was defendant DeLeon, a male hispanic. Sommella, gun drawn, identified himself as a police officer to DeLeon and also displayed his shield. (H. Tr. 23-24). Sommella then asked DeLeon to get out of the car. DeLeon refused to get out, but, instead, attempted to lock the car door. At that point Sommella opened the door and removed DeLeon from the car (H. Tr. 11-12, 24-25).

* Sommella had never previously seen a car in his patrol area similar to the one described by Morales. (H. Tr. 9-10).

Sommella then proceeded to frisk DeLeon for weapons. The policeman felt a large bulky object in the left-hand pocket of the dark-colored jacket worn by DeLeon. (H. Tr. 12, 25). Sommella removed the bulky object, thinking it was a weapon, (H. Tr. 26), but instead found a wad of folded-up U.S. currency, in small denominations, totalling \$157.00. (H. Tr. 13, 26). Sommella then reached into the other side of the jacket and found \$270.00 in counterfeit currency. (H. Tr. 26).

In the meantime, DeLeon's co-defendant, Matos, was apprehended by Officer Abdul-Rahim and brought back to the Plymouth Roadrunner.* Both men were then placed under arrest.**

The entire episode, from the time Sommella first spoke with Morales at his store, until the arrest of DeLeon, was estimated to have taken a scant five minutes. (H. Tr. 14).

B. The District Court's Decisions

Judge MacMahon first denied DeLeon's motion in an oral opinion, delivered after the completion of the testimony at the suppression hearing. The District Court

* Sgt. Tennant, the third police officer on the scene, had approached the passenger-side of the Roadrunner at the same time that Sommella first spoke to DeLeon. (H. Tr. 23-24).

** As indicated earlier, throughout these developments Morales was crouched down in the rear seat of the undercover taxi and could not observe the events. Morales, however, did overhear DeLeon say in Spanish to Matos: "Don't say anything." (H. Tr. 46, 50-51).

Morales was later brought to the police precinct where he advised the officers that DeLeon was not one of the two men who had entered his store earlier that night. He identified Matos as the first male to enter his store with the counterfeit \$50 bill. The second male, who subsequently entered the store, was never apprehended.

held that on the facts as presented, any reasonably prudent police officer would have concluded that a crime had been committed and that DeLeon and his companion were the people who had committed it. (H. Tr. 56). Judge MacMahon further stated that he would supplement his oral decision with a written memorandum.

In a written memorandum, dated March 8, 1977, and filed on March 14, 1977, Judge MacMahon set forth his findings of fact, and concluded that the police had probable cause to arrest defendants, that the search conducted was incidental to the arrest and that DeLeon's motion, therefore, was denied. The District Court held that the information known to the police officers at the time was sufficient to have supported a belief that DeLeon had committed a crime. The trial court ruled that, under the circumstances shown, the officers were justified in their belief that DeLeon was one of the participants in the crime alleged to have been observed by Morales and that this conclusion was not altered by the fact subsequently developed that DeLeon might not have been one of the two men to have entered Morales' store.* In support of the finding of probable cause, the District Court pointed to the following:

"(a) the belief of Morales and Martinez, both retail store clerks handling currency continually, that the tendered fifty-dollar bill was not genuine; (b) the accurate description of the Roadrunner which defendant drove away, which was different from any automobile the officer had seen in his precinct before or since this incident; (c) the location and direction of travel of the Roadrunner

* Judge MacMahon found that there was no evidence that the "officers had reason to know [DeLeon] was not the one who had gone into the store," and that "exigent circumstances" justified a quick response by the officers even without obtaining "Morales' positive identification" of appellant. (A. D-7).

when first seen by the officer, which corroborated Morales' story, and (d) the Hispanic features of defendant, which fit comfortably within the description given by Morales." (A. D-6, 7).

Moreover, Judge MacMahon also found that the police officers were at least justified in making an "investigatory stop and frisk" of DeLeon under the New York State Law standards for such a procedure, pursuant to N. Y. Crim. Proc. Law § 140.50. (McKinney, 1976 Supp.). Accordingly, the District Court found that under this alternative analysis as well, the discovery of the counterfeit bills then would have "justified a full arrest." Judge MacMahon concluded:

"Under either of the above rationales, it is clear that the seizure of evidence was justified by the circumstances known to the arresting officer, and the evidence need not be suppressed, nor need the statements be suppressed as the fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471 (1963)." (A. D-9)*

ARGUMENT

The District Court Properly Denied Defendant's Motion To Suppress.

DeLeon argues that the police officers did not have probable cause to arrest him—and, consequently to conduct an incidental search pursuant to which the counterfeit currency was seized—because there was insufficient information to show that any crime had been committed

* Following his arrest, DeLeon gave a written and signed confession to agents of the Secret Service who placed defendant under Federal arrest after being notified by the New York City Police Department.

and because he did not fit the description provided by Morales. Defendant contends further that the District Court's findings to the contrary are, in effect, clearly erroneous. These claims fall far short of their intended mark. A careful analysis of the record shows clearly that Judge MacMahon properly determined that probable cause existed for the police to believe both that a crime had been committed and that DeLeon was a participant in that crime. Moreover, viewing the evidence at the suppression hearing in the light most favorable to the Government, as it must be on this appeal, *United States v. Oates*, Dkt. No. 76-1100 slip op. 6389, 6392 (2d Cir. June 3, 1977), it is also clear that the District Court's alternative basis for upholding the search as following a lawful investigatory "stop and frisk," was correct.*

**A. At the Time Sommella First Approached DeLeon
There Was Probable Cause to Arrest Defendant**

DeLeon contends that Sommella's initial approach to the "Roadrunner" amounted to a "full arrest" and therefore that this "detention" can be justified only if probable cause existed at that time. He argues further that Judge MacMahon's finding of probable cause was erroneous. Assuming *arguendo* that the police officer's initial inquiry of the defendant was an "arrest"—a point the Government vigorously disputes, see *infra* at 14-18, the evidence then known to the policeman plainly was "sufficient to warrant a prudent man in believing that [the

* DeLeon, of course, does not dispute that the seizure of the counterfeit currency, if incident to a valid arrest, was proper. *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

defendant] had committed or was committing an offense," as the District Court found. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).*

When Officer Sommella first approached the distinctive and unusual automobile on December 10, 1976, he knew the following information: (1) only a few minutes before the *two* occupants of the car had attempted to pass a counterfeit bill to Morales and Martinez; (2) the attempt to pass the bill could not be viewed as inadvertent or accidental since the two men had gone out of their way to make two attempts to convince the storekeepers that the currency was legitimate; (3) the two suspects had been described over the car radio as "hispanics"; (4) following the attempts to pass the bill, the car's occupants did not leave the vicinity of the store, but were driving around slowly in the same general area in a pattern consistent with a further attempt to pass the counterfeit currency for genuine money; (5) indeed, one of the occupants in the automobile just had been observed to exit the car and the "Roadrunner" proceeded a block further south and then stopped, by inference, awaiting the return of the sole passenger after another attempt to pass the counterfeit currency; (6) the two "hispanics" had been described as of medium build, one of average height (5'2" to 5'4"), one taller (5'8" to 5'9"), one wearing a brown coat, one wearing a black cashmere coat, and both in their late teens or early twenties. In

* As we now demonstrate, it is clear that the police had more than sufficient probable cause to arrest DeLeon at the time he was first approached. This being so, the officer could make the arrest even without a warrant, N.Y. Crim. Proc. Law § 140.10 (1)(a) (McKinney's 1971), *United States v. Watson*, 423 U.S. 411 (1976), and DeLeon could be searched even though his formal arrest did not take place until the counterfeit was discovered. *United States v. Jenkins*, 496 F.2d 57, 73 (2d Cir. 1974); *United States v. Riggs*, 474 F.2d 699, 704 (2d Cir.), cert. denied, 414 U.S. 820 (1973).

such circumstances, the conclusions that a crime had been committed, and that DeLeon—an hispanic male, wearing a dark coat, *seated* in the distinctive car, and of the age and general build previously described by Morales—was one of the participants, were not only reasonable, but inescapable, as Judge MacMahon clearly found.

Notwithstanding this convincing proof of probable cause, DeLeon argues that the District Court both misconstrued and ignored pertinent facts developed at the suppression hearing. These claims distort the record before the experienced trial judge.

First, the shared opinions of Morales and Martinez that the proffered \$50 bill was counterfeit, together with their own actions and those of the two suspects, belie the assertion that there was insufficient reason to believe a crime had been committed. The suspects made *two* efforts to press the counterfeit \$50.00 bill on the storekeepers for the purchase of a relatively inexpensive item. At no time did either suspect offer a different bill or a lesser denomination to pay for the purchase. Instead, after their attempts to pass the bill proved unsuccessful, they left the store without further argument to minimize suspicion. Since Morales and Martinez operated a retail store in a central location in New York City, the trial court was entitled to infer that each had considerable experience in regularly handling bills of all denominations. Moreover, the intensity with which Morales and Martinez adhered to the view that the \$50.00 bill was counterfeit was itself further support of probable cause that a crime had been committed, and was amply demonstrated by Morales' careful efforts to follow the subsequent path of the two suspects, to carefully note the accurate description of the unusual vehicle used by the suspects, to promptly notify the police of the events and his willingness to accompany Sommella in a cruise through the area

to locate the suspects.* Finally, the officers' own observations of the suspicious actions of the very distinctive car pointed out by Morales, after the car had been sighted, were consistent with a pattern of holders of counterfeit currency trying to pass off their money in a given area ** and, when added to the information already supplied by Morales, confirmed the accuracy of his conclusion that a crime had been committed.

Second, contrary to DeLeon's argument, the police officers did have probable cause to believe that the driver of the unique "Roadrunner" was one of the participants in the crime. The officers only had been told that *two* suspects were involved in the attempt to pass the counterfeit bill: at the time of the initial interview, Morales did not advise the police that he had observed a separate third person at the wheel of the car. Moreover, DeLeon did fit the general description then known to the police—a description obtained both from a prior radio communication and from Morales' direct account. As noted above, DeLeon was of hispanic origin, medium build, in his early twenties, and 5'10" in height. While on a close comparison DeLeon was slightly taller than either suspect, when first observed he was *seated* in the specific car described by Morales only minutes before, and other-

* Naturally, since Morales was a witness to the crime rather than a cooperating informant there was no requirement that he be shown to have been reliable. *United States v. DiStefano*, Dkt. No. 994, 1085, slip op. 3559, 3548 (2d Cir. May 16, 1977); *United States v. Rueda*, 549 F.2d 865 (2d Cir. 1977). In any event, Morales' information was corroborated as events proceeded on December 10, 1976.

** Indeed, the reasonableness of this view of the suspects' activities is confirmed by the fact admitted in DeLeon's plea allocation that he and Matos were doing precisely what the officers reasonably determined had occurred: they were seeking to go from store to store to convert the counterfeit money into genuine bills.

wise plainly came within the general description that had been supplied.*

DeLeon's predictable suggestion that Morales' subsequent failure to identify him as one of the original suspects vitiates probable cause, is simply to no avail. As both the Supreme Court and this Court have recognized, in assessing probable cause the fact that the person arrested ultimately turns out not to be the suspect described, is irrelevant when the officers' actions amount to an understandable mistake. *Hill v. California*, 401 U.S. 797, 803-05 (1971); *United States v. Rosario*, 543 F.2d 6, 8 (2d Cir. 1976). Here, the officers' belief that DeLeon was one of the suspects plainly was justified, given the facts that defendant generally fit the description of the suspects, was in the specific distinctive vehicle carefully observed by Morales only moments before, and that the officers did not know that a third individual was involved in the crime.**

* The fact that DeLeon was wearing a dark leather coat, as opposed to a brown jacket, or a black cashmere coat, wanes in significance when it is remembered that the policemen properly were of the view that the two suspects were the *only* occupants of the unusual car. Indeed, since DeLeon, when first approached, otherwise met the general description previously supplied, the failure of the police officers to notice the specific dress detail is understandable. Moreover, since the officers had been provided with only a "quick" general description, they justifiably could have equated the dark leather jacket with the appropriate apparel the suspects were said to have worn. Finally it bears special emphasis that DeLeon was spotted in the unique automobile within a very brief time after the attempt to pass the bill. The closeness in time to Morales' original encounter with the suspects was, of course, another factor justifying quick action by the police.

** Furthermore, since Morales had made himself unavailable to the policemen for an up-close, eyewitness identification, and since the suspect obviously was in a position to flee if alerted to the presence of the police, the officers were justified in their

[Footnote continued on following page]

B. The Police Officer's Initial Approach to the Car Was Merely An Investigatory Stop and Developments Thereafter Unquestionably Justified Seizure of the Contraband

DeLeon's assertion of an unconstitutional search and seizure is rendered wholly without merit on this record when viewed from the proper perspective that the initial approach to the vehicle did not constitute an arrest, but merely an investigatory stop. Appellant acknowledges, as he must, that an investigatory stop is authorized on less than full probable cause, so long as there is a "reasonable suspicion" to justify a temporary stop for purposes of investigation. *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Oates*, *supra*, slip op. at 6411-12; *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976); *United States v. Santana*, 485 F.2d 365 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States v. Riggs*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). As set forth above, see *supra* at 9-13, the facts known to the police officer at the time of his approach to the car met the test of probable cause and, *a fortiori*, were more than sufficient to satisfy the "rather lenient" test for the "minimal intrusion" of an investigatory stop. *United States v. Santana*, *supra*, 485 F.2d at 368; *United States v. Riggs*, *supra*, 474 F.2d at 703. See also, *United States v. Salter*, 521 F.2d 1326 (2d Cir. 1975). Since the events which followed this initial permissible detention were clearly proper, they too supplied additional probable cause that justified DeLeon's arrest. *United States v. Oates*, *supra*, slip op. at 6421.

approach to the car without insisting that Morales accompany them. Indeed, the District Court correctly characterized these events as constituting "exigent circumstances" that supported the policeman's "quick response without taking the time to obtain Morales' positive identification." (A. D-8).

Officer Sommella's initial actions did not amount to an arrest of DeLeon. The car driven by defendant already had come to a complete stop by the curb when the officer alighted from his own vehicle. Sommella properly identified himself as a police officer and displayed his credentials to the defendant. Contrary to DeLeon's contention, defendant was not ordered out of his car at that time, but was merely asked to exit the car and talk with the policeman. DeLeon was not then told that he was under arrest, nor was he told that he would be frisked. In fact, DeLeon was not formally placed under arrest until the contraband had been found. In sum, at the point of the officer's approach to the car, DeLeon's liberty was only minimally restrained.

DeLeon, however, argues that this otherwise classic investigatory stop was converted to an arrest by virtue of the fact that Sommella "rushed toward Mr. DeLeon with his gun drawn, and proceeded to pull him from his car." (Br. at 12). This claim grossly exaggerates the hearing record. While Sommella concededly had his gun drawn when approaching the distinctive "Roadrunner," the record contains no evidence that the gun was actually visible to DeLeon or displayed to him. Sommella did not "rush" to the car, nor did he "pull" DeLeon from the vehicle until defendant took steps that indicated he might attempt to flee.* The presence of the officer's gun was

* While unquestionably DeLeon, when first approached by the patrolman, was not free merely to leave, this limited detention does not *ipso facto* amount to an arrest. In *United States v. Oates*, this Court recognized the now well-settled principle that "although every arrest is a form of detention, the converse is not true." (slip op. at 6409). While in *Oates*, no guns were drawn when defendants initially were stopped by the Customs' officers the presence of that additional fact here does not necessitate a finding of arrest. The question here, as in *Oates*, is whether the entirety of the circumstances supports the conclusion that DeLeon's liberty had not been so restrained when the officer first approached his car as to mandate that this "stop" be viewed as an arrest.

justified for his protection since he was approaching a vehicle, at night, in which he had strong reason to believe there was a suspect who had recently committed a crime. Without more, the fact of the gun does not warrant categorizing the instant "stop" as an arrest, particularly in the absence of any directive to the defendant not to move, or that he was then under arrest. *United States v. Worthington*, 544 F.2d 1275, 1280 n.3 (5th Cir. 1977); *United States v. Maslanka*, 501 F.2d 208, 213 n.10 (5th Cir.) (Moore, C.J., sitting by designation), cert. denied, 421 U.S. 912 (1975).

Upon DeLeon's refusal to honor the officer's request that he voluntarily leave the car, Sommella then was justified in concluding that this suspect might well be armed and dangerous. Indeed, as a matter of common sense, a suspect's refusal to comply with the officer's request—after the officer specifically had identified himself as a policeman and showed his shield—warrants the view that that person is sufficiently brazen and emboldened as to be armed and dangerous. Moreover, this Court recently has recognized that the "standard of suspicion necessary to allow a frisk for weapons is not a difficult one to satisfy," in order to assure protection of the investigating officer in the performance of his necessary lawful responsibilities. *United States v. Oates*, *supra*, slip op. at 6420; *United States v. Riggs*, *supra*, 474 F.2d at 705. Judged against this liberal standard, Sommella's basis for the frisk which followed clearly rested on more than "fragile grounds" and was sufficient to justify his pat-down search of DeLeon outside the car. *United States v. Oates*, *supra*.*

* Judge MacMahon noted that Sommella's frisk of DeLeon was justified in accordance with New York law. N.Y. Crim. Proc. Law § 140.50 (McKinney 1976 Supp.). While the District Court was not bound by state standards if more stringent, *Elkins v. United States*, 364 U.S. 206, 224 (1960); *United States v.*

[Footnote continued on following page]

In the ensuing frisk, Sommella felt a hard object that he believed might be a weapon. His removal of the object—which turned out to be a firm roll of small denominational genuine currency—plainly was proper. *United States v. Oates*, *supra*, slip op. at 6418-19; *People v. DeBour*, *supra*. Similarly, Sommella's removal of the counterfeit bills found in the pocket of the other side of DeLeon's outer garment, also was proper in the completion of this justifiable protective frisk.

DeLeon argues that the subsequent removal of the counterfeit bills went further than a frisk, and amounted to a search since the officer intruded into the pocket of defendant's clothing without any belief that the object felt was a weapon. Although we submit that the police officer legitimately could enter the pocket of an outer garment in furtherance of an otherwise permissible frisk for weapons, even without a suspicion that a weapon specifically was secreted in that pocket, this Court need not reach that question. DeLeon's initial refusal to exit the car to speak with Sommella, and the subsequent finding of the roll of genuine currency, when taken together with all of the other information previously known to the officer, supplied more than ample probable cause for DeLeon's arrest even before the counterfeit bills were found. Thus, Sommella's proper belief that the driver of the car was a participant in the crime was confirmed by defendant's highly incriminating unwillingness to comply with the officer's request to get out of the "Road-

Burke, 517 F.2d 377, 382 (2d Cir. 1975), under New York law as well, the frisk plainly was warranted. See, e.g. *People v. DeBour*, 40 N.Y. 2d 210, 386 N.Y. 2d 375, 352 N.E. 2d 562 (1976); *People v. Moore*, 32 N.Y. 2d 67, 343 N.Y.S. 2d 107, 295 N.E. 2d 780, *cert. denied*, 414 U.S. 1011 (1973); *People v. Washington*, 52 A.D. 2d 717, 382 N.Y.S. 2d 173 (4th Dept. 1976).

runner" and answer questions.* Moreover, the finding of a segregated roll of genuine bills in small denominations was totally consistent with the actions of a suspect attempting to pass counterfeit bills to convert them into good money. In short, by the time Sommella found the roll of genuine bills, he had compelling independent proof that DeLeon was one of the participants previously described by Morales. Since, as this Court recently has observed, "the existence of probable cause may develop during the course of a stop based on reasonable suspicion," the totality of events that had transpired prior to the finding of the contraband itself plainly warranted DeLeon's arrest, and the subsequent seizure of the counterfeit bills was therefore justified as incident to a valid arrest. *United States v. Oates*, *supra*, slip op. at 6421. See also, *Adams v. Williams*, *supra*, 407 U.S. at 148; *United States v. Riggs*, *supra*, 474 F.2d at 704; *White v. United States*, 448 F.2d 250, 253 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

In sum, whether the arrest here occurred at the time of the officer's initial approach to the car, or, more properly as we contend, after the counterfeit bills were found pursuant to a lawful stop and frisk, it is clear that Judge MacMahon correctly decided that the contraband was seized incidental to a valid arrest supported by probable cause. DeLeon's suppression motion, therefore, properly was denied by the District Court.

* Flight, or the appearance of flight, is a legitimate source of suspicion for a police officer. Here, DeLeon's actions took on greater significance because of the other information known to the experienced patrolman. *United States v. Davis*, 458 F.2d 819, 822 (D.C. Cir. 1972); *United States v. Hines*, 455 F.2d 1317, 1325 (D.C. Cir.), *cert. denied*, 406 U.S. 975 (1972). See also, *United States v. Christophe*, 470 F.2d 865, 868-69 (2d Cir. 1972), *cert. denied*, 411 U.S. 964 (1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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